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No. 08-1476

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DWIGHT J. LOVING,

Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE AND
UNITED STATES DEPARTMENT OF THE ARMY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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ARGUMENT

It must be admitted that the question of compulsory disclosure *vel non* of capital sentencing recommendations to the subject of those recommendations was answered by this Court long ago in *Gardner v. Florida*, 430 U.S. 349 (1977). Respondents advance not a single line of reasoning to elucidate why the military justice system should be immune to the strict disclosure rule of *Gardner* as predicated on the Due Process Clause. Now comes Petitioner, a military death sentenced Army Private whose life hangs in the balance as the President, the ultimate sentencing authority in military capital cases, considers in secret four sentencing recommendations made by the prosecution. It is the withholding of these documents under 5 U.S.C. § 552(b)(5) (2006) that petitioner contests in this FOIA case.

Petitioner concurs with non-profit *amicus curiae* National Institute of Military Justice ("NIMJ") in urging that "there is a pressing need for this Court to clarify . . . the functioning of FOIA when court-martial capital prisoners seek access to their own presidential sentencing recommendations." (NIMJ Br. 6.) "The Court should grant certiorari to consider and clarify the applicability of executive privileges . . . where the President is required to make an adjudicatory decision about whether to approve of a death sentence." (*Id.* at 23.)

To be sure, this is not a run-of-the-mill FOIA dispute; the mere assertion of presidential privilege belies any specter of triviality. But it is obnoxious both to the plain words of Article 71(a) of the Uniform Code of Military

Justice ("UCMJ") and to this Court's death penalty jurisprudence to argue that just because the Commander-in-Chief hails from the Executive Branch, his role in capital courts-martial is anything short of a sentence approval authority. The inescapable conclusion that the President's statutory review of a military death sentence extends well beyond clemency leads to the inevitable corollary that capital sentencing recommendations forwarded to him by the prosecutors at the Department of Defense and the Army cannot be eligible for privilege.

By arguing that (1) merely because the Commander-in-Chief is the recipient of the four withheld documents, they must be privileged (Opp. Br. 9) and (2) Loving's "countervailing need" is irrelevant (Opp. Br. 8), the government dodges the point argued by Petitioner. Specifically, the nature of the documents, as capital sentencing recommendations, is such that they are simply ineligible to be sheltered from Loving under cover of privilege. As a first-party FOIA requester, having sought these documents specifically under this disclosure statute, Loving is the only holder of a cognizable privilege (privacy) over these documents.

Withheld by respondents under FOIA Exemption 5 executive privileges—presidential communications and deliberative process—the general character of the four documents in this case has been admitted on the record and thus is not at issue.[1] The government already

[1] Respondents incorrectly state that "petitioner does not dispute that the deliberative process privilege applies to Document 87." (Opp. Br. 5 n.2.) To the contrary, Loving has (Cont'd)

described withheld record #408 as "[t]he final advice and recommendation" from The Judge Advocate General of the Army, forwarded to the President, regarding "the approval or disapproval of PVT Loving's death sentence." (C.A. App. 123, 126.) Withheld record #499, similarly forwarded to the President, has been described as the Secretary of the Army's "recommendation . . . whether to approve plaintiff Private Dwight Loving's death sentence." (C.A. App. 126, 212, 300-301, 312-314.) Finally, the government has described withheld records #86 and #87 as relating to "an actual recommendation regarding Loving's death sentence." (C.A. App. 295, 297.) Indeed, as recognized by the court of appeals, the government "denies neither the advisory nature of these documents nor the role they play in Article 71(a) actions." (Pet. App. 8a.)

Concomitantly, the government does not dispute that the issue before the Court is readily capable of repetition, with a not insubstantial queue of servicemembers currently on death row. Nor does the government dispute that the very class of documents now being withheld was previously treated as *unprivileged* and that the military's capital sentencing recommendations sent to the President previously were even published "for the information of all concerned."[2]

(Cont'd)

consistently maintained that no privilege applies to any of the disputed documents. Loving also has argued that if the presumptive deliberative process privilege applies to withheld record #87, the privilege is overcome due to the nature of this document.

[2] 1 C.M.R.(A.F.) ii (1949).

In their 5½ pages of "argument," respondents decline to address the implications of *Gardner* to the legitimacy of any governmental privilege claim over the four withheld records. By its silence, the government has failed to show why the question presented does not merit certiorari. Nor is the appropriateness of certiorari in this case diminished by the respondents' grumble that Loving relies on "nineteenth century authorities." (Opp. Br. 10.) The previous conclusions of this Court and an Attorney General, that in the military justice system Presidential approval of a sentence is judicial in character, have the same force of logic today as they did then.

Petitioner's arguments rest squarely on the shoulders of *Gardner*'s prohibition against secret capital sentencing recommendations and this Court's subsequent holding in *U.S. Dep't of Justice v. Julian* that "there simply is *no* privilege preventing disclosure" of sentencing reports to first-party FOIA requesters. 486 U.S. 1, 14 (1988).

A. The Case at Bar Is a FOIA Action, Not a "Constitutional Challenge" Reserved for Loving's Criminal Case.

Respondents suggest that there is no need to assess whether the four withheld documents, as capital sentencing recommendations, are eligible subject matter to which any privilege may attach preventing disclosure to Loving. Portraying this FOIA action instead as a "constitutional challenge" (Opp. Br. 10) and arguing that "[p]etitioner may seek judicial review of his constitutional claims . . . [b]ut FOIA does not furnish

petitioner with a cause of action to litigate such claims" (Opp. Br. 5), the federal respondents strain credulity.

Petitioner has made abundantly clear that this dispute is about the government's disclosure obligations to a first-party requester under the FOIA statute. Yet, the federal respondents seek to re-spin the present dispute as an "[im]proper vehicle through which to litigate petitioner's due process claim." (Opp. Br. 9.)[3] It cannot seriously be argued that the most basic of constitutional rights recognized by the Court in *Gardner* are somehow inapplicable to a servicemember facing possible execution.[4]

The fundamental disagreement between the parties to this action is not whether Loving's due process rights have been violated. The President has not yet acted on Loving's case, so from that perspective, no harm has yet occurred as a result of the non-disclosure thereby necessitating *habeas* proceedings. Rather, at the heart of the question presented lies a basic disagreement

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[3] *See also* Opp. Br. 10 ("Petitioner cites no authority to suggest that the President is constitutionally required to disclose any documents that inform his exercise of such discretion, let alone that the proper avenue for litigating such a constitutional challenge is an action under FOIA.").

[4] "[W]hen the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians." *Loving v. United States*, 517 U.S. 748, 774 (1996) (Stevens, J., with whom Souter, J., Ginsburg, J., and Breyer, J., joined, concurring).

about the nature of each of the four withheld documents. This Court has made clear that a FOIA exemption analysis "turn[s] on the nature of the requested document . . . ." *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772 (1989).[5] Specifically, while the government contends that "the documents at issue satisfy the elements of privileges encompassed by Exemption 5" (Opp. Br. 7), Petitioner contends that the documents in question fit squarely within the constitutional rule, flowing from *Gardner*, that capital sentencing recommendations are *per se* unprivileged.[6] In other words, as a precondition to undertaking any element-by-element privilege analysis, a document must be of a nature susceptible to the privilege sought to be applied.

That President Eisenhower parted ways with his predecessors and decided to maintain military capital sentencing recommendations in secret (Petitioner's Br. 15-16) does not excuse this practice today. For we now know from this Court's 1977 holding in *Gardner* that

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[5] *See also FBI v. Abramson*, 456 U.S. 615, 626 (1982) ("[I]n determining whether information in a requested record should be released, the Act consistently focuses on the nature of the information and the effects of disclosure."); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989) (a FOIA analysis requires "consideration of the nature of each particular document").

[6] *See, e.g., State v. Bosworth*, 360 So. 2d 173, 175-77 (La. 1978) (identifying "important due process and fairness values" and citing *Gardner* when mandating disclosure of sentencing reports even in the face of a state statute otherwise requiring that such reports "shall be privileged and shall not be disclosed" to the subject).

capital sentencing recommendations simply cannot be maintained in secret in order for sentencing to pass muster under the Due Process Clause. Their disclosure is a matter *ex necessitate legis*. "Once a substantive right or restriction is recognized in the Constitution, therefore, its enforcement is in no way confined to the rudimentary process deemed adequate in ages past." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). The practice of not disclosing military capital sentencing recommendations forwarded to the President has only survived due to the inactivity of the military death penalty over the last fifty years.[7] It cannot still be lawful under *Gardner*.

B. The President's Responsibilities Under Article 71(a) Transcend Clemency Inasmuch as the President Serves as the Ultimate Capital Sentencing Authority.

Article 71(a) of the UCMJ is crystal clear when stating that "[i]f the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until ***approved*** by the President." 10 U.S.C. § 871(a) (2006) (emphasis added). Yet the government apparently finds ambiguity in these words (without specifying where), turning to the legislative history of the Military Justice Act of 1983 and providing an out-of context quote to allege that the

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[7] Half a century passed between 1957 when President Eisenhower approved execution of a military death sentence and the only other such approval to date, by President Bush in 2008. *See, e.g.*, Barbara Barrett, *Bush OKs Soldier's Execution*, The News & Observer, July 29, 2008.

President's Article 71(a) powers merely concern "clemency." (Opp. Br. 10.) This cannot be correct.

As a threshold matter, the government's resort to legislative history is improper because the words of Article 71(a) are plain. *See, e.g., Garcia v. United States*, 469 U.S. 70, 75 (1984). The statute means what it says—a servicemember's death sentence may only be carried out if the President expressly approves it, and the option to disapprove the sentence therefore remains available. Article 71(a) goes on to state that "[i]n such a case" in which the death sentence is approved "the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit." Thus, optionally, Presidential clemency can follow Presidential approval (e.g., the President can "commute" the death sentence to life in prison). The statute, on its face, does not support the government's conclusion that Presidential review under Article 71(a) is confined to clemency.

"[O]nly the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language." *Garcia*, 469 U.S. at 75. When, as here, "the terms of a statute [are] unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'" *Ibid.* (citations omitted); *see also Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004) ("We should prefer the plain meaning since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history.").

Yet even if the words of the statute were unclear, nothing in the legislative history compels a reading of Article 71(a) that limits the President's role to one of clemency. The government relies on a Senate committee report concerning the Military Justice Act of 1983, which states:

> This legislation continues the present requirement that death sentences receive Presidential approval and that dismissal of an officer be approved by the Secretary of the Military Department concerned before such sentences are executed under Article 71. Such reviews are conducted after all legal reviews are completed, and do not involve a review of the legality of the proceedings; rather, they are conducted as a matter of clemency.

S. Rep. No. 98-53, at 24 (1983).

Taken alone, that quotation is misleading. Taken in combination with the immediately following text of the report, that quotation is given necessary context:

> In such cases, the remaining portion of the sentence may be executed when approved by the convening authority, but the President (in death cases) and the Secretary (in dismissal cases), as a matter of clemency, may remit any previously executed portion of the sentence.

* * *

> *Article 71(a)* is amended . . . . The term "remit" is used in this section in the sense of the power to pardon.

Id. at 24-25 (emphasis added).

As Article 71(a) provides, only "[i]n such a case" as the President first approves of the death sentence may he "commute, remit, or suspend the sentence." And the term "remit" is specifically implicated with respect to the President's pardon power. This is the optional clemency to which the legislative history refers.

The government separately attempts to shore up its flawed interpretation of the statute by analogizing the President's role to that of a state governor considering clemency. (Opp. Br. 10.) But, to reiterate, only "[i]n such a case" as the mandatory Presidential review has resulted in approval of the death sentence does the President turn to consideration of mercy. It is only after sentence "approval" has occurred that the President, like a governor, may then consider clemency. Otherwise, the President and a governor have powers over death sentences that bear no resemblance to one another. For example, in Texas (where Loving's crimes were committed) and Kansas (where Loving currently is incarcerated), execution of a death sentence does not require approval from the governor, and gubernatorial clemency requests are entirely optional. *See, e.g.*, 37 Tex. Admin. Code §§ 143.41-143.43; Kan. Stat. Ann. §§ 22-3701 – 22-3705.

While "the President possesses wholly discretionary authority as to his decision-making process" (Opp. Br.

10), he has authority to disapprove a sentence and thus not reach the issue of whether, in his discretion, clemency should be granted. Of similar importance is the undeniable truth that springs from Article 71(a): without Presidential action, a military execution cannot occur.

In sum, the President's role in the military justice system vis-à-vis the death penalty is multifaceted. "Pursuant to Article 71, the President acts as the final review, appeal and clemency authority for a soldier sentenced to death." Paul H. Turney, *New Developments in Military Capital Litigation: Four Cases Highlight the Fundamentals*, 2000 Army Law. 103, 104. The President's responsibilities first lie in determining whether to approve the death sentence. When the President acts in the military justice system, "if he approves of the proceedings of the court, his approval, like a judgment of a court of the last resort, is final and conclusive, and there can be no appeal from it." *Wooley v. United States*, 1857 U.S. Ct. Cl. LEXIS 148, at *5 (Ct. Cl. Dec. 15, 1857).

In defining military law and discipline, the will of Congress is entitled to "the highest deference." *Loving*, 517 U.S. at 768. It is Congress that established the Article 71(a) statutory duty requiring that a military death sentence must be "approved" by the Commander-in-Chief, and this act plainly is tantamount to pronouncing the ultimate sentence on a servicemember.[8]

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[8] Rule for Courts-Martial 1207 only requires that "[n]o part of a court-martial sentence extending to death may be executed until approved by the President." In contrast, Article 71(a) not only requires approval before execution of the death sentence but further permits the President to commute or remit the sentence.

It is for these reasons that the President has distinct and unmistakable death sentencing responsibility in the military justice system. To deny that the scope of the President's statutory review includes deciding whether to approve or disapprove a death sentence would be "to shut one's eyes to the realities of military law and custom." *Jackson v. Taylor*, 353 U.S. 569, 579 (1957). In Article 71(a), as with any other statutory provision of the UCMJ, "[i]t is not for us to question the judgment of the Congress in selecting the process it chose." *Id.* at 580.

C. Petitioner Is Not "Waiving" Any Executive Branch Privilege Over the Four Withheld Documents Since No Privilege Can Rightfully Be Asserted.

It is a *non sequitur* to argue that the Exemption 5 executive privileges asserted by the government in this FOIA case are invulnerable to attack on the basis of the constitutional mandate recognized in *Gardner*. Yet the government argues that "[t]hose privileges belong to the President and the Executive Branch, not petitioner, and petitioner has no right to 'waive' the Executive Branch privileges at issue." (Opp. Br. 9.) Waiver presumes that a legitimate privilege may actually attach. But the four withheld documents, as already explained, are associated with a protected class and are *per se* unprivileged with respect to first-party requester Loving. Quite simply, he is the subject of those capital sentencing recommendations.

Petitioners argue that "[c]ourts do not engage in balancing or weighing of interests to determine whether particular documents are covered by a litigation privilege and therefore not subject to public disclosure under Exemption 5." (Opp. Br. 8.) This again misses the point. There is nothing to weigh if the only party protected by a cognizable privilege is the first-party FOIA requester.

CONCLUSION

For the reasons given in Loving's petition and this reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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